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THE LACK OF UNIFORMITY IN THE LAW AND PRACTICE OF STATES WITH REGARD TO MERCHANT VESSELS

THERE is at present considerable discussion regarding questions with respect to "the freedom of the seas." These questions, so often vaguely referred to, should presumably be understood to relate to the exercise of belligerent rights on the sea and to embrace such matters as a possible codification of international law touching this subject, proper compliance with rules heretofore generally accepted if not always strictly observed, the desirability of amendments to such rules, and the formulation of principles to meet new problems that have grown out of the recent conflict. In the light of events in connection with the war the present situation with regard to the disposition of such questions through international agreement unhappily appears more difficult than that which confronted the delegates who assembled in conference at London in 1908 on the invitation of the British Government to reach an understanding among the nations represented relative to the rules of international law concerning the laws of naval warfare, and formulated the so-called London Declaration signed February 26, 1909.

On the other hand, when normal commercial relations are restored with the advent of peace, attention will probably be drawn more strongly than heretofore to certain conditions which are obviously detrimental to the promotion of safety of travel at sea and detrimental generally to the harmonious international relations necessary to the development of commerce, such conditions being consequent upon an unfortunate lack of uniformity among states with regard to certain branches of maritime law governing the responsibility of shipowners, laws pertaining to safety of navigation, and laws relating to the general question of jurisdiction over merchant vessels in foreign ports.

It is the purpose of this article briefly to call attention to certain matters touching this subject of the want of harmony in the municipal laws of maritime nations, namely: (1) efforts made in recent years

largely on the initiative of the British Government looking to the remedy of existing difficulties through international agreements; (2) the law and practice of the United States bearing on some phases of the general subject under consideration; and (3) certain important questions lately raised in American and British courts as to jurisdiction over vessels operated under governmental control.

I

On the invitation of the Government of Belgium an international conference on maritime law was held at Brussels in 1905, for the purpose of promoting uniformity in relation to certain questions of maritime law. Representatives of Belgium, The Kongo, Spain, France, Italy, Japan, Norway, The Netherlands, Roumania, Russia, Sweden, and the United States signed a protocol providing for the submission to their respective governments of *projets* of conventions on collision and salvage respectively. An adjourned meeting of this conference met on October 16 of the same year at Brussels, and the delegates present signed a protocol not materially different from that drafted at the previous meeting. This latter protocol likewise provided for the submission to the governments represented of two drafts of conventions relating to collision and salvage. These proposed conventions had their origin in drafts of conventions approved by the International Maritime Committee at a conference held in Hamburg in 1902. A third session of the conference met at Brussels September 28, 1909. It was attended by delegates from the United States, Germany, Argentine Republic, Austria-Hungary, Belgium, Brazil, Chile, Cuba, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Nicaragua, Norway, Netherlands, Portugal, Roumania, Russia and Sweden. The conference adjourned on October 8 and reconvened September 12, 1910. Two conventions relating to collisions and salvage were approved by the conference and referred to the several governments. The conference also considered drafts of two conventions relating respectively to the limitation of shipowners' liability and maritime liens, but no final action was taken with regard to such proposed conventions. The convention with regard to salvage has been ratified by

the Government of the United States.¹ The convention with regard to collisions has not been ratified by this Government and has not come before the Senate for consideration.

At a conference held at London on the invitation of the Government of Great Britain in 1914 representatives of Germany, Austria-Hungary, Belgium, Denmark, Spain, United States, France, Great Britain, Italy, Norway, Netherlands, Russia and Sweden signed the International Convention on the Safety of Life at Sea. This agreement contains comprehensive provisions relating to precautions against dangers to navigation, the construction of vessels, and appliances for life saving and fire protection. The outbreak of the war rendered nugatory, for the time being at least, the work of this conference.

Ratifications of but few countries, among which the United States is not included, have been deposited with the British Government.

The Senate of the United States, in a Resolution dated December 16, 1914, gave consent to ratification of the convention with a proviso in which it is declared in part that "the United States reserves the right to . . . impose upon all vessels in the waters of the United States such higher standards of safety and such provisions for the health, protection and comfort of passengers, seamen and immigrants as the United States shall exact for vessels of the United States." If other governments should take the view that the so-called reservation contained in the resolution of the Senate is equivalent to an amendment of the treaty or a reservation of a right of the Government of the United States to disregard the provisions of the treaty at will, it would seem that such nations might object to the acceptance of such a ratification. And this Government would appear to be in a position to deposit its ratification only if it may properly be considered that the reservation made by the Senate in connection with its consent to the ratification of the convention is in effect a surplusage which does not affect the treaty directly and at most only violates the treaty in spirit,

¹ International Convention for the Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, ratification of which was deposited with the Belgian Government January 25, 1913. See Act to carry this treaty into effect (37 Stat. L. 242).

or if the convention should be sent back to the Senate and an unconditional consent should be given by that body to ratification of the convention.

In the interest of safety of life at sea the several signatory powers prescribed in the treaty, through their plenipotentiaries in conference, certain standards with respect to the equipment and operation of vessels. The Government of the United States having agreed to these standards, it seems odd for this Government to make a declaration to the effect that it will adhere to them but that it reserves the right to change them and to impose on all vessels in its waters, foreign as well as American vessels, such higher standards of safety as it may deem appropriate.

However, it can perhaps be plausibly argued that, whatever action might be taken in the future in accordance with the possible purposes indicated in the Senate's reservation with respect to the Convention for the Safety of Life at Sea, such action would not necessarily be violative of the treaty, though it might be objectionable to foreign nations whose vessels it would affect.

A fair construction of the treaty seems to be that it imposes upon each of the contracting nations obligations to exact of its own vessels the requirements of the convention with respect to their equipment and operation, but not obligations to see to it that these requirements are met by the vessels of other contracting nations.

It would, therefore, seem that, although foreign nations might question the right of this Government to substitute in its judgment standards as to the equipment of American vessels in place of those specified by the treaty, if it should impose on its own vessels not only the standards required by the treaty but also certain higher standards, other nations would not be in a position to complain of a violation of the treaty on the part of this Government.

Should this Government attempt to impose on vessels of other nations standards other than those prescribed by the treaty, such action would doubtless be regarded by those nations as objectionable, but a complaint of treaty violation could probably be met with the reply that the only obligations which the treaty imposes on this Government are those requiring it to see to it that its vessels are operated

and equipped in accordance with the rules prescribed by the treaty, and that if this Government sees fit to prescribe certain rules for vessels of other countries, its action in such a matter is one with which the treaty is not concerned, so long as the regulations imposed on the foreign vessels are not such as to require these vessels to disregard the standards prescribed by the convention.

Unfortunately it seems possible that the work of the conference which framed this convention may become a nullity in consequence of the intervention of the war. But it may be that an understanding can be reached to prevent such a result.

II

It appears that the Government of Great Britain had under consideration shortly prior to the outbreak of the war the question of the advisability of endeavoring to effect an arrangement with other nations with regard to the question of jurisdiction over merchant vessels in foreign ports. Possibly this interesting subject may be taken up when the condition of international affairs will permit such action.

The Supreme Court of the United States and the lower federal courts have in numerous cases set forth the rules defining the law and practice of the United States relative to the exercise of criminal and civil jurisdiction by this government over foreign merchant vessels and persons on board of them in territorial waters of this country, and over American vessels and persons thereon in foreign waters. Reference to a few cases will serve to call attention to the general principles enunciated.

With regard to the exercise of jurisdiction in criminal matters by the courts of this country over foreign ships in American waters and over persons on board such vessels, the leading case may doubtless be considered to be that known as *Wildenhus's Case*,² in which the Supreme Court of the United States sustained the jurisdiction of the courts of New Jersey where the crime of felonious homicide had been committed by a Belgian subject on the person of another Belgian subject on board of a Belgian vessel lying in the port of Jersey City,

² 120 U. S. 1.

New Jersey. In the following excerpt from the opinion of the court delivered by Mr. Chief Justice Waite are enunciated the rules underlying the assumption or non-assumption of jurisdiction by the local courts:

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purpose of trade, it subjects itself to the laws of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in *The Exchange*, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." *United States v. Dieckelman*, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, Sec. 351; Twiss' Law of Nations in Time of Peace, 229, Sec. 159; Creasy's Int. Law, 167, Sec. 176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. *Regina v. Cunningham*, Bell C. C. 72; S. C., 8 Cox C. C. 104; *Regina v. Anderson*, 11 Cox C. C. 198, 204; S. C., L. R. 1 C. C. 161, 165; *Regina v. Heyn*, 13 Cox C. C. 403, 486, 525; S. C., 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.

The rules with regard to the exercise of civil jurisdiction in cases involving the rights of foreign vessels or persons connected with such vessels have frequently been announced by the courts in a variety of cases.

In *ex parte* Newman³ a case in which foreign seamen had libeled a foreign vessel for wages, the Supreme Court of the United States said that admiralty courts will not take jurisdiction in such a case, except where it is manifestly necessary to do so to prevent failure of justice; that the better opinion is that independent of treaty stipulations there is no constitutional or legal impediment to the exercise of jurisdiction in such a case, but that the courts will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted.

In the case of the *Carolina*,⁴ a British vessel, in which an action was brought by a foreign seaman in the United States Court for the District of Louisiana to recover damages for assault and battery alleged to have been committed on the high seas, the court said:

It is undoubtedly true, as a general proposition, that an action for a personal tort follows the person, and may be brought in any foreign court. It is also true that the courts of a nation are established and maintained for the convenience of its own citizens or subjects, and if foreigners are permitted to become actors therein it is because of what is termed comity between nations. American Law Review, vol. 7, p. 417, and Daniel Webster's Works (Everett's Edition), vol. 6, pp. 117, 118. The only ground upon which a foreigner could urge a claim to become a libellant in our courts would be that it was by comity due his government that its subjects should be thus heard, and, so far as this claim could be considered as a right, it could be insisted on only by that government, and, except in cases of inhumanity or gross injustice, would disappear whenever the claimant's government took a position against it.

The court stated that the exercise of jurisdiction in this case was discretionary, and that the courts of Great Britain afforded adequate redress to the libellant. The court therefore declined to take jurisdiction.

In *Patterson v. Barke Eudora*,⁵ the Supreme Court of the United

³ 14 Wall. 152.

⁴ 14 Fed. Rep. 424.

⁵ 190 U. S. 169.

States held that a British vessel and its master were within the provisions of the Act of December 31, 1898, prohibiting the payment to seamen of advanced wages. The Court, after referring to previous decisions in relation to the question of jurisdiction over foreign vessels, said:

The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign as well as to domestic vessels.

The general principles laid down in the cases to which attention has been called are concisely summarized with citations in the following extract from the opinion of the court in the case of *Ester*,^s in which suit was brought against a Swedish steamship by a seaman to recover unpaid wages and damages for personal injury:

(1) The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain. *United States v. Diekelman*, 92 U. S. 520, 23 L. Ed. 742; *Wildenhus' Case*, 120 U. S. 11, 7 Sup. Ct. 385, 30 L. Ed. 565.

(2) In the absence of treaty stipulations, the courts of admiralty have civil jurisdiction in all matters appertaining to the foreign ship while in port, and also in certain cases when the court has the vessel in its territorial jurisdiction, although the cause of action arose on the high seas, *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565.

(3) The exercise of this civil jurisdiction, where those who are concerned are all citizens of the same foreign state and the cause of action occurred on or with regard to the ship, is not imperative, but discretionary, and the courts from motives of convenience or international comity will not take jurisdiction without the assent of the consul of the country to which the ship belongs, where the controversy involves matters arising beyond the territorial jurisdiction of this country, or relates to differences between the master and the crew, or

the crew and the shipowners. In such cases on such general principles of comity, the admiralty courts of this country will not interfere between the parties, unless there is special reason for doing so, and will require the foreign consul to be notified, and although not absolutely bound by, will always pay respect to, his wishes as to taking jurisdiction. *Ex parte Newman*, 14 Wall. 152, 20 L. Ed. 877; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Patterson v. Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

(4) Where, however, special circumstances exist, such as where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, the courts, in the absence of treaty stipulations, will entertain jurisdiction. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

(5) Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed. *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; *Widenhus' Case*, 120 U. S. 17, 7 Sup. Ct. 385, 30 L. Ed. 565.

(6) Congress has power by legislation to regulate matters affecting foreign seamen and foreign vessels and foreigners generally when within the ports of this country by making their entrance subject to such conditions as Congress may seek to impose or withdrawing its consent to permit them to enter wholly, if it see fit. *Patterson v. Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

With reference to the question of the jurisdiction over American merchant vessels in foreign territorial waters, it may be said that the Government of the United States in the past has asserted in behalf of its vessels the rights which, as indicated by the judicial decisions just mentioned, are accorded to foreign vessels in waters of the United States. This Government, while conceding on the one hand that when one of its vessels visits the port of another country for the purposes of trade it is amenable to the jurisdiction of that country and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty, has on the other hand, on a number of occasions, made clear its view that by comity matters of discipline and all things done on board which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which

the vessel belongs, as the laws of that nation or the interests of its commerce may require.⁷

Private vessels belonging to this country are deemed parts of its territory. They are accordingly regarded as subject to the jurisdiction of this country, on the high seas, and in foreign ports, even though they admittedly are also temporarily subject generally to the laws of such ports.

In *United States v. Rodgers*,⁸ a case in which the Supreme Court sustained the jurisdiction of courts of the United States to try a person for an assault committed on a vessel belonging to a citizen of the United States while such vessel was in the Detroit River and within the limits of the Dominion of Canada, Mr. Justice Field, who delivered the opinion of the court, said:

It is true, . . . that, as a general principle, the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs.

On March 4, 1915, the President approved an Act of Congress usually referred to as the "Seamen's Act."⁹ The general purposes of this law evidently were the improvement of the condition of seamen and the promotion of safety of life at sea.

Whatever may be the merits of this act it can undoubtedly be said to have aroused a good deal of criticism in foreign countries. The questions that have arisen in connection with its enforcement with regard to foreign vessels, to which it is applicable the same as to American vessels, may be said to fall into two classes, namely: (1) those

⁷ See Moore, Digest, II, pp. 272-362.

⁸ 150 U. S. 249.

⁹ 38 Stat. L. 1164.

involving treaty rights affected by certain provisions of the act, and (2) those which, while not involving legal rights, relate to international comity and established customs of nations.

Provisions of the first-mentioned class are found in Sections 4 and 16 of the Act. Section 4, which provided among other things for the enforcement of certain specified rights of foreign seamen respecting their wages, and further provided that the courts of the United States should be open to such seamen for its enforcement, was inconsistent with treaty stipulations withdrawing from the jurisdiction of local authorities wages disputes between masters and members of the crews of merchant vessels. Section 16 directed the President to give notice within ninety days of the passage of the act to foreign governments of the termination of treaty stipulations providing for the arrest and imprisonment of deserting seamen from vessels of the United States abroad or from foreign vessels in American ports. Stipulations in a score of treaties were affected by the law.¹⁰

The act was framed so that at the end of a certain period the stipulations inconsistent therewith could no longer be enforced in this country and should of course not be invoked by American Consular Officers abroad. And since practically all of these agreements did not contain provisions for partial abrogation a somewhat difficult task in adjusting conflicts between the law and the treaty provisions in question confronted the executive department of the Government except in two instances in which the treaties contained no provisions other than those affected by the law.

Statutory provisions of the second class just mentioned are found

¹⁰ Austria-Hungary, May 8, 1848, Art. IV, and July 11, 1870, Arts. XI and XII; Belgium, March 9, 1880, Arts. XI and XII; Bolivia, May 13, 1858, Art. XXXIV; China, June 15, 1858, Art. XVIII; Colombia, December 12, 1846, Art. XXXIII, and May 4, 1850, Art. III; Denmark, July 11, 1861, Arts. I and II; Great Britain, June 3, 1892; France, June 24, 1822, Art. VI, and February 23, 1853, Arts. VIII and IX; Greece, November 19, 1902, Arts. XII and XIII; Italy, May 8, 1878, Art. XIII, and February 24, 1881; Independent State of the Kongo, January 25, 1891, Art. V; Netherlands, January 19, 1839, Art. III, and May 23, 1878, Art. XII; Norway, July 4, 1827, Arts. XIII and XIV; Roumania, June 17, 1881, Arts. XI and XII; Spain, July 3, 1902, Arts. XXIII and XXIV; Sweden, June 1, 1910, Arts. XI and XII, and July 4, 1827, Arts. XIII and XIV; and Tonga, October 2, 1886, Art. X.

in Sections 4, 11, 13 and 14 of the act. Section 4 provides that seamen shall be entitled to receive on demand from the master of the vessel one-half of the wages which they have earned at every port where the vessel shall load or deliver cargo. Section 11 makes unlawful the payment of advance wages of seamen. Section 13 provides that no vessel (with certain exceptions) shall be permitted to depart from a port of the United States unless it has on board a crew not less than 75 per centum of which in each department are able to understand any order given by the officers of the vessels, nor unless a certain percentage of the crew "are of a rating not less than able seamen." Section 14 of the law contains provisions relating to "life saving appliances, their equipment and the maintaining of the same."

Briefly summarized, the important international aspects of the Act of March 4, 1915, which have been pointed out, grow out of provisions thereof that affect treaty arrangements of long standing, that apparently in a measure set aside the general rule of comity under which American courts have refused to take jurisdiction in certain controversies between masters and seamen, and that run counter to laws and customs of other countries and have the effect of nullifying contracts made outside of the jurisdiction of the United States, and of compelling foreign nations to conform to the ideas of this country in matters relating to the equipment of vessels and the treatment and qualifications of seamen, some phases of which are dealt with by the London Convention for the Safety of Life at Sea.

III

Some interesting questions have been raised in the courts of this country and in British courts during the war with regard to jurisdiction over vessels which have been diverted from their customary employment because of conditions brought about by the war, namely, vessels requisitioned by the governments to which they belonged and government owned vessels employed in commerce.¹¹

¹¹ See *The Luigi*, 230 Fed. Rep. 495; *The Attualita*, 238 Fed. Rep. 909; *The Pampa*, 245 Fed. Rep. 137; *The Florence H.*, 248 Fed. Rep. 1014; *The Roseric* (D. C. N. J.) decided in November, 1918; *The Broadmayne* (1916), L. T. Rep. 891; *The Messicano*, 32 L. T. Rep. 519.

In the case of *The Attualita*,¹² an Italian merchant vessel requisitioned by the Italian Government, the Circuit Court of Appeals for the Fourth Circuit held that the vessel was not exempt from suit in a court of this country. This ship, which it appears was employed in the Italian Government service at a fixed rate and remained under the control and management of the owner who paid the officers and crew, had been libeled by a Greek steamer to recover damages for loss resulting from a collision between the two vessels which occurred in the Mediterranean Sea. The contention was pressed in this case that *The Attualita* being under requisition of the Italian Government was immune from the jurisdiction of the courts of this country under principles of international law.

The decision of the court appears clearly to be grounded on sound principles.

It is of course well settled that aliens have free access to the courts of this country to maintain and defend their rights in cases of this character.¹³

In the opinion of the court reference was made to the well known case of *The Exchange*,¹⁴ in which the Supreme Court of the United States held that the public armed vessels of a foreign nation may, upon principles of comity, enter the harbors of this country with the presumed license of the government, and while there are exempt from the jurisdiction of local courts.

Chief Justice Marshall in rendering the opinion of the court said that the "perfect equality and absolute independence of sovereigns, and common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." It appears that he divided these cases into the following classes: (1) the immunities accorded the person of the sovereign in a foreign country; (2)

¹² 238 Fed. Rep. 909.

¹³ *The Maggie Hammond*, 9 Wall. 435; *The Belgenland*, 114 U. S. 368; *The Kaiser Wilhelm der Grosse*, 175 Fed. Rep. 215.

¹⁴ 7 Cranch, 116.

the immunities granted by civilized nations to foreign diplomatic representatives; (3) the immunities allowed the troops of a foreign prince which are permitted to pass through his dominions; and (4) the immunities granted to public armed vessels.

In the light of this often quoted rule there appears to be no violation of international law or comity in the action of an admiralty court in taking jurisdiction in proceedings *in rem* or *in personam* instituted with a view to recovering indemnity for loss resulting from the alleged improper navigation of a merchant vessel the services of which the owner thereof has been temporarily required by his government to place at its disposal in consideration of a stipulated compensation for such services.

Any contention that a court in the United States should not adjudicate a controversy of this kind because a sovereign should not be impleaded as a private litigant to defend his rights before judicial tribunals of a foreign government, appears clearly not to be well grounded. The action of a court in taking jurisdiction in the case must not necessarily result in impleading the government to which the vessel belongs, since the courts are open to the owner of the vessel to defend his rights in proceedings instituted against it.

The following excerpt from the opinion of the court in *Workman v. The Mayor*,¹⁵ in which Mr. Justice White discussed at some length the question of the right to recover for maritime torts committed by government owned vessels, seems pertinent to this point:

We, of course, conceive that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely the cause of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of power in courts of admiralty to redress a wrong committed by one

over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted.

The principle enunciated by Mr. Justice White apparently underlies the decision of the court in the case of *Johnson Lighterage Co. No. 24*,¹⁶ in which it was held that a suit *in rem* could be maintained against the property of a foreign government to recover for salvage services rendered in saving the property while in the possession of a Lighterage Company which had contracted to transport it from a railroad terminal to a vessel. Judge Haight, in the opinion rendered by him in this case, said:

It is undoubtedly the general rule that the courts of this country are without jurisdiction to entertain, except by consent, either an action in personam against our own government or that of a friendly foreign nation or sovereign, or an action against its property in its possession and devoted or destined to be devoted to the public use. *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 189; *Stanley v. Schwalby*, 147 U. S. 508, 512, 13 Sup. Ct. 418, 37 L. Ed. 258; *The Exchange*, 7 Cranch, 116, 3 L. Ed. 287; *Tucker v. Alexandroff*, 183 U. S. 424, 440, 463, 22 Sup. Ct. 195, 46 L. Ed. 264; *Hassard v. United States of Mexico*, 46 App. Div. 623, 61 N. Y. Supp. 939; *Briggs v. Light Boats*, 11 Allen (Mass.) 157. But there is what may be termed an exception to this rule, although it is probably not strictly such, which was enunciated and applied by the Supreme Court, so far as our own government is concerned, in *The Davis*, 10 Wall. 15, 19 L. Ed. 875, and followed and applied as to a foreign government by Judge Brown, in the Southern District of New York, in *Long v. The Tampico* (D.C.) 16 Fed. 491. This so-called exception, I think, must control the questions to be decided in the case at bar. In the former of these cases it was held that personal property of the United States on board a private vessel for transportation from one point to another was liable to a lien for services rendered in saving it, and although such lien could not be enforced by a suit against the United States, or by a proceeding in rem, when the possession of the property could only be had by taking it out of the actual possession of an officer of the government, yet it could be enforced by a proceeding in rem where the process

¹⁶ (1916) 231 Fed. Rep. 365.

of the court could be enforced without disturbing the possession of the government.

In *The Attualita* case the court very pertinently commented as follows on the serious consequence of a decision which would grant to a privately owned merchant vessel in the service of the government whose flag it flies the immunities accorded to foreign war vessels:

There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is responsible in any way. For actions of the public armed ships of a sovereign, and for those whether armed or not, which are in the actual possession, custody and control of the nation itself, and are operated by it, the nation would be morally responsible although without her consent not answerable legally in her own or other courts. For the torts and contracts of an ordinary vessel it and its owners are liable. But the ship in this case, and there are now apparently thousands like it, is operated by its owners, and for its action no government is responsible at law or in morals.

The persons in charge of the navigation of the ship remain the servants of the owners and are paid by the owners. The immunity granted to diplomatic representatives of a sovereignty, to its vessels of war, and under some circumstances to its other property in its possession and control, can be safely afforded because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requisition to be under charter to sovereign governments.

In line with the thought expressed in the above quoted excerpt it may be observed that, if merchant vessels under requisition of the government of the country to which they belong should be regarded as entitled in the ports of another country to the immunities accorded to public armed vessels the local tribunals of such other country would seemingly be impotent to determine even the rights of its own nationals in cases involving torts, salvage and contracts of various kinds, and controversies between seamen and masters of vessels. And the local courts might be precluded from the administration of criminal jurisprudence in cases wherein the arrest of any persons con-

nected with the vessel for an offense committed within the territorial jurisdiction of the country wherein the courts are located might occasion delay in the departure of the vessel from the port.

With regard to the question of the lack of remedies open to persons who may be precluded from asserting rights against a vessel under requisition in the courts, it seems clear that it is not a sufficient answer that redress may be sought directly from the government to which the vessel belongs. If, as seems possible might be the case, no such redress is available—and at best it would be inconvenient and uncertain—such persons evidently have no remedy except by application to their government for assistance through diplomatic channels, a remedy likewise uncertain as well as long drawn out.

There are other serious questions pertinent to be considered in relation to the status of requisitioned vessels. If the view should be taken that such vessels should be given a treatment assimilated to that accorded to vessels of war and should not be subjected to laws and regulations governing merchant vessels in foreign ports, a grave question might be raised as to the propriety of neutral governments permitting such vessels freely to enter and leave their ports and to transport therefrom merchandise of all kinds, including articles of contraband in times of war.

In the case of *The Belgenland*,¹⁷ the Supreme Court of the United States pointed out that there are certain circumstances in which courts in this country will exercise their discretion to take or to refuse jurisdiction over foreign vessels, their officers, and crews in ports of the United States.

In the case of *The Attualita* it was argued that in the exercise of a sound discretion jurisdiction should be declined. Such a contention, the court held, was foreclosed by what the court said in the case of *The Belgenland*. It may be observed with regard to this point that, apart from what the court said in this last mentioned case, the grounds upon which it appears proper to sustain the jurisdiction of courts in cases involving requisitioned vessels seem pertinent to the question as to whether the courts should in the exercise of their discretion decline to take jurisdiction.

¹⁷ 114 U. S. 365.

The reasons why courts should not decline to take jurisdiction in the case of vessels of the character in question could seemingly be advanced at least to some degree against the action which it appears was taken by Judge Chatfield of the District Court of the Eastern District of New York, in deciding that, without prejudice to the court's jurisdiction, the steamship *Glenedin*, a private merchant vessel, under requisition to the British Government, might be released to that Government for the purpose of being used as a public vessel on the giving of a bond to secure the claim or to return the vessel except as the needs of the British Government might keep it elsewhere while under requisition or charter by the British admiralty.¹⁸

In the case of the *Maipo*,¹⁹ the District Court for the Southern District of New York held that a naval transport owned by a foreign government and in its possession through a naval captain and crew, although chartered to a private individual to carry a commercial cargo, was not subject to seizure under process of an admiralty court of the United States in a suit by shipper for damage to the cargo. The contention appears to have been raised by the libellant in this case that the ship was subject to process because of its use for commercial purposes. A case of this character appears to raise a question of jurisdiction somewhat more vexatious than that involved in the case of a requisitioned vessel engaged in trade.

In the case of *The Charkieh*,²⁰ Sir Robert Phillimore held that a vessel owned by the Khedive of Egypt, though flying the flag of the Turkish Navy, was not free from process *in rem*, when she had come with a cargo to England and had been entered at the customs like an ordinary merchant vessel. While the case apparently was decided on the ground that the Khedive was not an independent sovereign, the court said:

I must say that if ever there was a case in which the alleged sovereign (to use the language of Bynkershoek) was "strenue mercatorem agens," or in which, as Lord Stowell says, he ought to "traffick on the common principles that other traders traffick" it is the present

¹⁸ Decided November 27, 1918.

¹⁹ (July 8, 1918) 252 Fed. Rep. 627.

²⁰ Law Rep. 4 A. & E. 59.

case; and, if ever a privileged person can waive his privilege by his conduct, the privilege has been waived in this case.

It was not denied, and could not be denied, after the evidence that the vessel was employed for the ordinary purposes of trading. She belongs to what may be called a commercial fleet. I do not stop to consider the point of her carrying the mails, for that was practically abandoned by counsel. She enters an English port and is treated in every material respect by the authorities as an ordinary merchantman, with the full consent of her master; and at the time of the collision she is chartered to a British subject, and advertised as an ordinary commercial vessel. No principle of international law, and no decided case, and no dictum of jurists of which I am aware has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character; while it would be easy to accumulate authorities for the contrary position. (See, especially, Klüber *Europe. Volkerrecht*, Sec. 210, and authorities cited in note.)

Judge Mayer in his decision in the case of *The Maipo* referred to the case of *The Charkieh* as the "sole authority for the libellant's view" of the status of *The Maipo* and said that the former had been overruled by *The Parlement Belge*.²¹ In that case the court held that an unarmed packet belonging to the King of Belgium and in the hands of officers commissioned by him and employed in carrying mails was not liable to be seized in a suit *in rem* to recover redress for a collision, and that the fact that the vessel had been engaged in trade did not take away the immunity attaching to it as a public vessel, the property of an independent sovereign.

Judge Mayer's opinion in the case of *The Maipo* is evidently in harmony with the decision in the *Parlement Belge*, and with the general trend of American and British cases involving questions with regard to the immunity of government owned property.²² However, it is submitted that there is a sound doctrine in the observations made by Sir Robert Phillimore in the case of *The Charkieh* with regard to

²¹ (1878) L. R. 5 P. D. 197.

²² *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Stanley v. Schwalby*, 147 U. S. 508; *Hassard v. Mexico*, 61 N. Y. Supp. 939; *The Athol*, 1 Wm. Rob. 374.

the forfeiture of immunity by a government owned vessel employed for commercial purposes.

The experience of judicial and administrative authorities in the United States during the last few years, when navigators of requisitioned vessels and government owned vessels have frequently been involved in litigation in courts in this country, and when large quantities of various kinds of property have been purchased here in behalf of foreign governments, suggests the unfortunate consequences of a general rule that courts of the United States are without jurisdiction to entertain a suit against the property of a foreign government within the jurisdiction of this country. If the theory of such an immunity is carried to its logical conclusion, it would seem to follow that not only may persons be deprived of the right to institute proceedings involving government owned property in tort and in contract but governmental authorities may be debarred from imposing equitable taxation on such property and from subjecting it to laws generally applicable to similar privately owned property. To the objection that the taking of jurisdiction by the courts in cases of this character is derogatory to the sovereignty of the government to which the property belongs, it seems a sufficient answer that it is equally and indeed considerably more derogatory to the sovereignty of the country in which the property is found to be shorn of vital attributes of sovereignty, exercised through administrative and judicial authorities, in order that such immunity may be granted.

It is interesting to observe in connection with this question of immunity of government owned vessels that the Act of Congress of September 7, 1916,²³ contains the following provision with regard to the operation of vessels purchased, chartered or leased from the United States Shipping Board:

Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole, or in part, or hold any mortgage, lien or other interest therein.

The importance of harmonious practice among nations with re-

²³ 39 Stat. L. 728.

gard to questions such as those roughly sketched in this article is obvious. Considering the difficulties in the way of progress in attaining this object, it is unfortunately true that much time and effort will be required in making any appreciable headway in dealing with the numerous and various problems requiring solution.

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